

February 15, 2012

Thomas Prescott, Labor Attorney  
Office of the General Counsel  
Alameda-Contra Costa Transit District  
1600 Franklin Street  
Oakland, CA 94612

Re: Your Request for Advice  
**Our File No. A-12-018**

Dear Mr. Prescott:

This letter is in response to your request for advice on behalf of the Alameda-Contra Costa Transit District (the “District”) regarding provisions of the Political Reform Act (the “Act”).<sup>1</sup> Additionally, please note, our advice is limited to obligations arising under the Act. We do not address the applicability, if any, of other state or local law such as statutes regulating the making of gifts with public funds, common law conflicts of interest, or Government Code Section 1090.

### QUESTIONS

1. May the General Counsel advise the District with respect to a pension plan of which he will be a beneficiary?
2. If the General Counsel were to have a conflict of interest, may a staff attorney, supervised by the General Counsel, provide advice to the District?

### CONCLUSIONS

1. So long as the plan is not unique to the General Counsel, he may participate in the decision.

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

2. Assuming that the General Counsel did have a conflict of interest, his staff would be able to participate. His conflict of interest would be personal to him and would not be imputed to his staff. However, he could not make, participate in making, or influence any decision in which he has an economic interest.

## FACTS

The District is currently developing a second tier pension program. Once finalized the new General Counsel will participate in the plan (and likely the new General Manager will as well). The District requests the Commission's advice on the following questions:

**FIRST ISSUE:** Is the general counsel to a public entity that is creating and will be implementing a pension to which the general counsel will be a beneficiary, precluded from providing advice to the public entity on said pension?

**SECOND ISSUE:** Is a staff attorney *supervised* by the general counsel to a public entity that is creating and will be implementing a pension to which the general counsel will be a beneficiary, precluded from providing advice to the public entity on said pension?

## ANALYSIS

The Act's conflict-of-interest rules (Sections 87100 et seq.) prohibit a public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. Section 87103 provides that a public official has a "financial interest" in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the official's economic interests.

The Commission has developed an eight-step process for deciding whether an official has a disqualifying conflict of interest in a given governmental decision; we generally describe this process below. (Regulation 18700(b)(1)-(8).)

### **Step 1. Are the individuals in question public officials?**

The Act's conflict-of-interest provisions apply only to "public officials." (Sections 87100, 87103; Regulation 18700(b)(1).) "Public official" is defined as "every member, officer, employee or consultant of a state or local government agency . . ." (Section 82048.) A "local government agency" means a county, city or district of any kind, including any county board or commission. (Section 82041.) Thus, the General Counsel and his staff are public officials under the Act.

**Step 2. Are the public officials making, participating in making, or using their official position to influence a governmental decision?**

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.)

A public official “participates in making a governmental decision” when, acting within the Authority of his or her position and without significant substantive or intervening review, the official negotiates, advises or makes recommendations to the decision-maker regarding the governmental decision. (Regulation 18702.2.)

Public officials are also prohibited from “influencing” a governmental decision. There are two rules as to whether a public official uses or attempts to use his or her official position to influence a governmental decision. The first rule applies when the governmental decision is within or before the public official’s own agency or an agency appointed by or subject to the budgetary control of the public official’s agency, but the public official is not a decision-maker per se. (Regulation 18702.3(a).) In that case, if “the official contacts, or appears before, or otherwise attempts to influence, any member, officer, employee, or consultant of the agency” then he or she is attempting to influence a governmental decision. This includes, but is not limited to, “appearances or contacts by the official on behalf of a business entity, client, or customer.” (Ibid.)

The second rule applies when the governmental decision is within or before an agency other than the public official’s own agency, or an agency appointed by or subject to the budgetary control of the public official’s agency. (Regulation 18702.3(b).) Under this rule, the official cannot act or purport “to act on behalf of, or as the representative of, his or her agency to any member, officer, employee or consultant of an agency” to influence a decision. (Ibid.)

The General Counsel and/or staff would be participating in the making of a decision by advising the Board.

**Step 3. What are the official’s economic interests?**

The Act’s conflict-of-interest provisions apply only to conflicts of interest arising from economic interests. A public official has an economic interest in:

- A business entity in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a); Regulation 18703.1 (a)); or in which he or she is a director, officer, partner, trustee, employee or holds any position of management (Section 87103(d); Regulation 18703.1(b));

- Real property in which he or she has a direct or indirect interest of \$2,000 or more (Section 87103(b); Regulation 18703.2);
- Any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (Section 87103(c); Regulation 18703.3);
- Any source of gifts to him or her if the gifts aggregate to \$420 or more within 12 months prior to the decision (Section 87103(e); Regulation 18703.4);
- His or her personal finances, including those of his or her immediate family -- this is the “personal financial effects” rule (Section 87103; Regulation 18703.5).

Because pension will be part of compensation paid to the official by his or her government employer, the pension benefits paid by the district would not make the district a “source of income” to the General Counsel or district employees. (Section 82030(b)(2).) However, a financial effect on government salary and benefits may still be disqualifying as a personal financial effect discussed below.

#### **Step 4. Are the economic interests directly or indirectly involved in the decision?**

“In order to determine if a governmental decision’s reasonably foreseeable financial effect on a given economic interest is material, it must first be determined if the official’s economic interest is directly involved or indirectly involved in the governmental decision.” (Regulation 18704.5.)

Thus, under Regulation 18704.5 a public official is deemed to be directly involved in decisions that have any financial effect on the official’s personal finances, even a penny’s worth. A decision on the pension benefits the official will receive is a financial effect on the personal finances of the official. Therefore, the official’s economic interest in their personal finances would be directly involved in the decision.

#### **Steps 5 and 6. Will there be a material and foreseeable financial effect on the economic interests?**

Moser, Kenneth /SAME/ Once a public official identifies his or her relevant economic interests, the official must evaluate whether the decision will have a material financial effect on any of those economic interests.<sup>2</sup> The official must find the applicable materiality standard in Commission Regulations. (Section 87103; Regulation 18700(b)(5), Regulation 18705, et seq.) Since the officials’ interest is directly involved in the decision, Regulation 18705.5 applies:

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<sup>2</sup> In addition, the official must determine if a material financial effect is reasonably foreseeable. An effect upon economic interests is considered “reasonably foreseeable” if there is a substantial likelihood that it will occur. (Regulation 18706(a).) Whether the financial consequences of a governmental decision are substantially likely at the time the decision is made depends on the facts surrounding the decision. A financial effect need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility. (Regulation 18706; *In re Thorner* (1975) 1 FPPC Ops. 198.)

“(a) A reasonably foreseeable financial effect on a public official’s or his or her immediate family’s personal finances is material if it is at least \$250 in any 12-month period . . . .

“(b) The financial effects of a decision which affects only the salary, per diem, or reimbursement for expenses the public official or a member of his or her immediate family receives from a federal, state, or local government agency shall not be deemed material, unless the decision is to appoint, hire, fire, promote, demote, suspend without pay or otherwise take disciplinary action with financial sanction against the official or a member of his or her immediate family, or to set a salary for the official or a member of his or her immediate family which is different from salaries paid to other employees of the government agency in the same job classification or position, or when the member of the public official’s immediate family is the only person in the job classification or position.”

Applying these rules to your question, subdivision (a) of Regulation 18705.5 provides that the effect of a governmental decision is material for an official when the decision has a “personal financial effect” of \$ 250 or more on the official.

However, subdivision (b) of that regulation takes the “government salary” exception set forth in Section 82030(b)(2) into account and, when the financial effect is on the official’s own government salary or benefits, permits the official to still participate in the decision *so long as the salary or benefits in question are for all of the government agency’s employees who are in the same job classification or position*. In other words, when the government decision is meant to apply to an entire class of employees and is not tailored to specific employees in that class, the regulation permits the affected officials to participate in the decision.

The pension program in question here meets this standard. It appears it will apply to an entire range of officials, not just the General Counsel. If this is the case, the General Counsel would not be disqualified from participating in the decisions.

### **Steps 7 and 8. Other Exceptions**

Even if you determine that a decision would have a reasonably foreseeable material financial effect on one or more of your economic interests, you may still participate in the decision if the effect on your interests is not distinguishable from the effect on the public generally. Additionally, in certain rare circumstances, you may be “legally required” to participate in a decision. Since we do not know what kinds of decisions of the committee might arise with respect to your client, we can only provide this general discussion of the exceptions.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini  
General Counsel

By: John W. Wallace  
Assistant General Counsel  
Legal Division

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